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June 2, 2000

By UPS overnight mail
(Monday delivery)

Surface Transportation Board
Office of the Secretary
Case Control Unit
Attn: STB Ex Parte No. 582 (Sub-No. 1)
1925 K Street, N.W.
Washington, DC 20423-0001

Re: STB Ex Parte No. 582 (Sub-No. 1), *Major Rail Consolidation Procedures*

Dear Mr. Secretary or Representative:

Enclosed please find an original and 25 copies of Reply Comments, for filing with the Board in the above referenced matter.

Twenty-five copies accompany the original. Also enclosed is a 3.5-inch IBM-compatible floppy diskette (in Word Perfect 7.0 format), providing an electronic copy of these Reply Comments.

Very truly yours,

Tom McFarland

Thomas F. McFarland, Jr.
Attorney for IMC Global Inc.

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cc: Bob Pence - Northbrook
Don Nunn - Bannockburn

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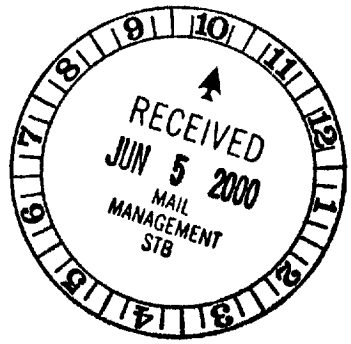
ORIGINAL

BEFORE THE
SURFACE TRANSPORTATION BOARD



MAJOR RAIL CONSOLIDATION PROCEDURES	)	EX PARTE NO. 582 (SUB-NO. 1)

REPLY COMMENTS

IMC GLOBAL INC.
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Commentor

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Attorneys for Commentor

DUE DATE: June 5, 2000

BEFORE THE
SURFACE TRANSPORTATION BOARD

MAJOR RAIL CONSOLIDATION PROCEDURES	))	EX PARTE NO. 582 (SUB-NO. 1)

REPLY COMMENTS

Pursuant to the procedural decision in this proceeding served March 31, 2000, IMC GLOBAL INC. (IMC) hereby submits reply comments in this proceeding.

CONSENSUS PRINCIPLES

Attached to these reply comments as Appendix 1 is a listing of Principles for Reform of Merger Proceedings and Related Regulation.

IMC joins with numerous members of the rail customer community in endorsing those Principles.

The Board should note the solid shipper consensus in support of those Principles, and should draw on those Principles in formulating proposed merger rules in this proceeding.

REPLY COMMENTS

The principal point that IMC wants to address in reply is the contention of the Association of American Railroads (AAR) at page 8 of its comments that in seeking pro-competitive merger regulations, shipper parties are seeking reregulation of the rail industry and reversal of the benefits of the Staggers Act. That AAR argument is inaccurate and unfair.

Reregulation adds new rules or regulations not provided for under current law. The pro-competitive merger regulations sought by IMC are already provided for under current law.

We are referring to use of the Board's merger conditioning power to provide for competitive access through rail line divestiture, trackage rights and other means.

In enacting the ICC Termination Act of 1995 (ICCTA), Congress recognized the need for pro-competitive action in rail merger cases. By virtue of an amendment that resulted in 49 U.S.C. § 11324(c), Congress authorized the Board to "impose conditions governing the transaction (i.e., approval of the merger or control of at least two Class I railroads), including the divestiture of parallel tracks or requiring the granting of trackage rights and access to other facilities." The legislative history of ICCTA explains the intent of Congress, viz. (Cong. Rec. - House, H15042, Dec. 18, 1995):

> A second change from present law elaborates on the existing power to impose conditions on the approval of a merger or other regulated transaction. The bill explicitly authorizes imposition of conditions requiring divestiture of parallel tracks or requiring the granting of trackage rights. It also requires that if trackage rights are required, the agency must provide for compensation arrangements that ensure the alleviation of the underlying anticompetitive effects sought to be avoided by imposing the trackage rights conditions.

Congress thus made it clear that the Board is authorized to condition approval of major rail merger or control transactions on aggressive conditions for competitive access to alleviate anticompetitive effects, i.e., rail line divestiture, trackage rights or other means of access to facilities. Congress would not have taken steps to clarify the Board's power to take such aggressive action unless Congress intended that the Board take such action in appropriate circumstances. As this record amply demonstrates, such circumstances would be presented by merger or common control of the few Class I railroads that remain in existence.

AAR well knows, or should know, that the Board has authority to take action in conditioning approval of mergers that might be beyond its authority if undertaken outside of a

merger context. *Compare Louisville and Nashville Railroad Company v. United States*, 369 F.Supp. 621, 627-628 (W.D. Ky., Louisville Div., 1973, 3-Judge Court) (ICC had authority to condition approval of merger on grant of trackage rights to third party), with *Magner-O'Hare Scenic Ry. v. ICC*, 692 F.2d 441, 445 (6th Cir. 1982) (ICC cannot compel one carrier to grant trackage rights to another). The Board does not compel a grant of trackage rights when it imposes trackage rights as a condition to approval of a merger. The Board's approval of a merger is permissive; the merger applicants need not consummate the merger if the trackage rights condition is objectionable. *See Boston & Maine Corp. Trackage Rights over Conrail*, 360 I.C.C. 239, 241 (1979) ("The Commission does have the power to impose trackage rights, even where no agreement has been filed with the application, as a condition to a rail consolidation . . . If all the carriers involved do not accept the conditions imposed by the Commission, they need not consummate the transaction.").

AAR is wrong, therefore, in suggesting that those who favor increased use of rail lines divestiture, trackage rights or other aggressive competitive access devices as the price of approval of additional mergers, thereby advocate reregulation. On the contrary, IMC is simply advocating that the Board make use of the conditioning tools specifically made available by Congress less than five years ago to deal with increasingly anticompetitive effects of major rail mergers.

CONCLUSION AND REQUESTED RELIEF

WHEREFORE, the Board should take into consideration the matter contained in IMC's Comments and Reply Comments in formulating proposed merger regulations, including the

Principles for Reform of Merger Proceedings and Related Regulations listed in Appendix 1 attached to these Reply Comments.

Respectfully submitted,

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Attorneys for Commentor

DUE DATE: June 5, 2000

CERTIFICATE OF SERVICE

I hereby certify that on June 2, 2000, I served the foregoing document, Reply Comments, by first-class, U.S. mail, postage prepaid, on all parties of record appearing in the Board's official service list.

Thomas F. McFarland, Jr.

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